

IMPACT FEE ADMINISTRATOR REPORT & RECOMMENDATION

IMPACT FEE APPEAL - IFA-004005:

APPELLANT: Berean Fundamental Church of Lincoln, Nebraska
6400 S. 70th Street
Lincoln, NE 68516
(402) 483-6512

PROPERTY: 6400 South 70th Street

REQUEST: The appellant is appealing from the Impact Fees Determination dated May 4, 2004 (#IF0406982) on the basis that (1) the determination failed to consider appropriate credits which would have decreased the fee; (2) the determination was improperly computed and determined in that the formula set forth in the ordinance and regulations was not correctly followed; and (3) the imposition of the "Impact Fee" is in fact a tax which Berean Church is exempt from paying under Nebraska law.

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| RECOMMENDATION: |
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| Denial |
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REASONS:

- (1) The appellant failed to timely request an exemption from arterial street impact fees pursuant to Lincoln Municipal Code §27.82.060(c) as the exemption was not applied for on or before the date the application for the building permit was made.
- (2) The appellant failed to timely appeal from the May 4, 2004 determination pursuant to Lincoln Municipal Code §27.82.110(i) as the appeal was not filed with the City Clerk within ten days after the May 4, 2004 determination.
- (3) The development for which the building permit was requested does not meet any of the stipulations or conditions required for reduction in or exemption from arterial street impact fees.
- (4) The arterial street impact fees were correctly calculated pursuant to Lincoln Municipal Code §27.82.050(c)(1) through the use of the arterial impact fee schedule adopted by the City Council as appellant did not request that the City determine the amount of such impact fees pursuant to an independent fee calculation study.
- (5) The appellant is not exempt from paying the arterial impact fees under Nebraska law as the fees, if determined to be a tax, would be an excise tax and not a property tax.

FACTS:

- (1) On April 27, 2004, Sampson Construction Company, on behalf of the appellant, applied for a building permit to construct a 30,325 square foot new structure on the church property located at 6400 South 70th Street. Building Permit No. B0401352 was issued for this new structure on June 25, 2004.
- (2) On April 27, 2004, Sampson Construction Company submitted on behalf of the appellant a request for an Impact Fees Determination for the new structure, identified as Impact Permit No. IF040692 for Building Permit No. B0401392. Under paragraph (c) of the Impact Fees Determination form entitled Exemptions/Exclusions Claim, Sampson Construction Company only requested exemption for water system, water distribution, and wastewater impact fees on the basis that the new building would be connected to the existing water service and without any increase in the size of the water meter. The requested exemptions from water system, water distribution and wastewater impact fees were granted and the Impact Fee Administrator determined that the total amount of impact fees due for the project was \$19,529.30, all attributable to arterial street impact fees. The \$19,529.30 was calculated using the Arterial Street Impact Fee Schedule beginning January 1, 2004 for church use (\$644/1,000 square feet).
- (3) The \$19,529.30 impact fees payment was paid to and received by the Department of Building and Safety on June 25, 2004.
- (4) The Impact Fee Notice of Appeal was received in the City Clerk's Office on July 21, 2004.

DISCUSSION:

Lincoln Municipal Code §27.82.050(a) provides that "any person who applies for a building permit for a development . . . shall pay a water system impact fee, water distribution impact fee, wastewater impact fee, arterial street impact fee, and neighborhood park and trail impact fee unless the type of development described in the permit or to be engaged in is specifically exempted, waived or subsidized by this ordinance [Impact Fee Ordinance]. . . .

Lincoln Municipal Code §27.82.060(c) provides that if a permit is required for the proposed development, any claim for exemption must be made no later than the date of the application for the permit for the proposed development. No claim for an exemption from arterial street impact fees was made on or before June 25, 2004 when the building permit was issued. The only request for exemption made on or before June 25, 2004 was the request for the approved exemptions from water system, water distribution, and wastewater impact fees.

Lincoln Municipal Code §27.82.110(i) provides that "[a]ny determination made by any official of the City charged with the administration of any part of this ordinance may be appealed

by the aggrieved party to the City Council by filing (1) a written Notice of Appeal on a form provided by the City, and (2) a written explanation of why the appellant feels that a determination was in error. Subsection (i) further provides that appeals must be filed with the City Clerk within ten days after the determination for which the appeal is being filed." The notice of appeal in this matter was not filed until June 21, 2004, which date is well beyond the ten-day period in which to file the notice of appeal from the May 4, 2004 Impact Fees Determination.

Lincoln Municipal Code §27.82.050(c) provides that the Impact Fee Administrator shall determine the amount of each required impact fee through the use of impact fee schedules adopted by the City Council unless the person applying for the permit for development requests that the City determine the amount of such fee pursuant to an independent fee calculation study. Subsection (c)(4) provides that if a person is applying for a permit for the expansion, redevelopment, or modification of an existing development, the fee shall be based on the net increase in the fee for the new use as compared to the previous use, and subsection (c)(5) provides that if no use was in operation on the site within the last fifteen years, the redevelopment shall be treated the same as a new development. In the present matter, whether the construction of the new building was deemed to be an expansion of the existing church use or a new church use, the calculation of the impact fee due under the impact fee schedule would be the same as the unit of measure for a church is per 1,000 square and the fee per unit is \$644.

Article VIII, Section 2 of the Constitution of the State of Nebraska provides in part that the Legislature by general law may classify an exemption from taxation property owned by and used exclusively for religious purposes, when such property is not owned or used for financial gain or profit to either the owner or user. This section of the state constitution authorizing tax exemption for property owned by churches is not self-executing but requires action by the Legislature to carry the constitutional provision into effect. Indian Hills Comm. Ch. v. Bd. of Equal., 226 Neb. 510, 412 N.W.2d 459 (1987). That legislation is found in Neb. Rev. Stat. § 77-202 (Reissue 2003) which provides that (1) the following properties shall be exempt from property taxes: . . . (d) property owned by educational, religious, charitable or cemetery organizations. . . and used exclusively for educational, religious, charitable, or cemetery purposes when such property is not (i) owned or used for financial gain or profit to either the owner or the use. However, this exemption is not applicable to excise taxes as excise taxes are not a tax upon property but rather a tax upon a privilege. In re Estate of Rudge, 114 Neb. 335, 207 N.W. 520 (1926). Here, the impact fees are not based on property value and thus cannot be classified as a tax on property. State v. Galven, 221 Neb. 497, 378 N.W.2d 182 (1985). Rather, if said fees constitute a tax, they are a tax on the privilege of developing property and thus constitute an excise tax. However, the issue as to whether the impact fees are a regulation or a tax has not been finally determined as the decision of the district court holding said fees to be a valid excise tax is on appeal to the Nebraska Court of Appeals.